88-1666

Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

STEPHEN EDWARD LEICHTY,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Where the Government has properly seized a package in plain view which clearly contains contraband by its outward appearance should the Government also be entitled to conduct a full warrantless search of the package?

TOPICAL INDEX

	Pages
OPINIONS BELOW	2
JURISDICTION	2 - 3
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3 - 5
STATEMENT OF FACTS	6 - 11
HOW THE FEDERAL QUESTION IS PRESENTED	11 - 13
REASONS FOR GRANTING THE WRIT	13 - 16
ARGUMENT	17 - 29
I. WHERE THE GOVERNMENT HAS PROPERLY SEIZED A PACKAGE IN PLAIN VIEW WHICH CLEARLY CONTAINS CONTRABAND BY ITS OUTWARD APPEARANCE THE GOVERNMENT SHOULD ALSO BE ENTITLED TO CONDUCT A FULL WARRANTLESS SEARCH OF THE PACKAGE SINCE ALL PRIVACY INTERESTS IN IT HAVE ALREADY BEEN EXTINGUISHED	17 - 18
A. THIS CASE IS THE NEXT LOGICAL STEP IN THE EVOLUTION OF THE "SINGLE-PURPOSE CONTAINER EXCEPTION" TO THE WARRANT REQUIREMENT	18 - 23

B. CERTIORARI SHOULD BE GRANTED TO DELINEATE THAT THE "VEHICLE EXCEPTION" TO THE WARRANT REQUIREMENT ALSO APPLIES TO PACKAGES CONSIGNED TO COMMON CARRIERS 23 - 26

C. CERTIORARI SHOULD BE GRANTED TO GIVE FURTHER CLARIFICATION TO *UNITED STATES* v. *JACOBSEN* (1984) 466 U.S. 109 AS LOWER COURTS ARE SERIOUSLY MISINTERPRETING IT 27 - 29

CONCLUSION 30

APPENDICES

TABLE OF AUTHORITIES

CASES	Pages
American Railway Express Co. v. *Levee* (1923) 263 U.S. 19	3
Arizona v. *Hicks* (1987) 480 U.S. 321	15, 17, 18
Arkansas v. *Sanders* (1979) 442 U.S. 753	14, 17, 19, 24
Chambers v. *Maroney* (1969) 399 U.S. 42	12, 15, 23, 26
Colorado v. *Bertine* (1987) 479 U.S. 367	14
New York v. *Belton* (1981) 453 U.S. 454	14
People v. *Leichty* (1988) 205 Cal.App.3d 914	2, 13, 21, 22, 25
People v. *McKinnon* (1972) 7 Cal.3d 899	24
People v. *Williams* (1988) 198 Cal.App.3d 873	19
Robbins v. *California* (1981) 453 U.S. 420	14, 20, 24
United States v. *Jacobsen* (1984) 466 U.S. 109	13, 16, 27, 28
United States v. *Miller* (9th Cir. 1985) 769 F.2d 554	12, 17
United States v. *Mulder* (9th Cir. 1987) 808 F.2d 1346	28

TABLE OF AUTHORITIES CONTINUED

	Pages
United States v. *Ross* (1982) 456 U.S. 798	14
United States v. *Williams* (D.C. Cir. 1987) 822 F.2d 1174	19
CONSTITUTIONS	
United States Constitution Fourteenth Amendment	3
United States Constitution Fourth Amendment	3, 12-14, 28, 29
STATUTES	
United States Code tit. 28, § 1257(3)	3
OTHER AUTHORITIES	
1 W. LaFave, Search & Seizure § 2.2, at p. 240; § 7.2 at p. 254 fn. 73 (1978)	19
J. Choper, Y. Kamisar & L. Tribe, The Supreme Court: Trends and Developments 1980-1981 at pp. 104-105 (1982)	19

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PETITION FOR WRIT OF CERTIORARI

Petitioner, State of California, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the California Court of Appeal, Fourth Appellate District, Division Two, issued on November 1, 1988, excluding the seized evidence and reversing the order of probation, entered on August 17, 1987. A petition for review

and alternative request for depublication was denied by the California Supreme Court on February 15, 1989. The remittitur was issued on February 22, 1989.

OPINIONS BELOW

The opinion of the California Court of Appeal, Fourth Appellate District, Division Two, reversing the order of probation (*People* v. *Leichty* (1988) 205 Cal.App.3d 914) appears as Appendix A of this petition. A copy of the California Supreme Court's order denying review without opinion appears as Appendix B.

JURISDICTION

The California Court of Appeal, Fourth Appellate District, Division Two, entered its judgment and opinion on November 1, 1988. On November 30, 1988, the People filed a timely petition for review with the California Supreme Court. On February 15, 1989, the petition for

review was denied. Title 28, United States Code, section 1257(3), confers jurisdiction on the Court in this case.

Where the highest state court has jurisdiction to review a decision of a lower state court, but refuses to do so, the time for petitioning for a writ of certiorari runs from the date of the higher court's refusal to review. (*American Railway Express Co.* v. *Levee* (1923) 263 U.S. 19, 20-21.) Since filed within 60 days of the California Supreme Court's denial of review, this petition is timely.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendments Four and Fourteen.

STATEMENT OF THE CASE

In an information filed by the District Attorney of San Bernardino County on January 20, 1987, respondent, Stephen

Edward Leichty, was charged with manufacturing methamphetamine, possession for sale of methamphetamine, and transporting, importing or selling methamphetamine. (CT 125-126.)[1/]

Respondent's motion to suppress evidence was heard and denied on April 27, 1987. (CT 170; RT 3-19.) Respondent subsequently pled guilty on June 19, 1987, to possession for sale of methamphetamine in exchange for the other two counts being dismissed. (CT 172-175.)

On August 17, 1987, respondent was granted probation for a period of three years; one of the conditions being that he serve 120 days in county jail. The jail term was stayed pending appeal. (CT 176-178.)

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1. The designation "CT" refers to the Clerk's Transcript on appeal. The designation "RT" refers to the Reporter's Transcript of the hearing on the motion to suppress held April 27, 1987.

On November 1, 1988, the California Court of Appeal, Fourth Appellate District, Division Two, excluded the seized evidence and reversed respondent's grant of probation in a published opinion. (Appendix A.)

On February 15, 1989, the California Supreme Court denied petitioner's petition for review and alternative request for depublication. (Appendix B.) The remittitur was issued on February 22, 1989.

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STATEMENT OF FACTS[2/]

On September 23, 1986, at 4:00 p.m., Michael Brooks, Night Shift Supervisor for Air Cargo, International, located at the Ontario Airport was on duty when he saw respondent bring in a package for air shipment to Denver, addressed to Greg Ramsey. (CT 11-12, 96.) Respondent appeared very nervous and was wearing dark sunglasses inside the building; this struck Brooks as odd because the inside of the building was dark and most people who entered wearing sunglasses would

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2. The facts are taken from the transcript of the preliminary examination held on January 6, 1987 (CT 4-124), and from the transcript of the hearing held April 27, 1987, on the motion to suppress. (RT 3-19.) The transcript of the preliminary examination was submitted into evidence at the hearing on the motion to suppress. (RT 3.) These two hearings and the points and authorities submitted on the motion (CT 130-169) served as the sole basis for the trial court's decision to deny respondent's motion to suppress.

immediately take them off. (CT 13, 23.) Respondent told Brooks that the package contained "personal effects." (CT 13.)

Brooks recalled, after respondent left, that 20 days earlier on September 3, 1986, he had inspected a questionable package addressed to respondent from Denver. (CT 9-10, 14.) That earlier package had smelled strongly of ether, a hazardous substance. (CT 9.) Brooks had telephoned respondent after the package had been picked up for him by his friend, Mr. Ramsey, and explained to respondent the problems of having such a volatile substance shipped on an airplane. Respondent promised it would not happen again. (CT 11-12.)

After connecting respondent and Mr. Ramsey with the earlier incident, Brooks contacted the supervisor on duty, Dobromil Frank, Supervisor of Customer Service at United Airlines, and advised

him of his suspicions. (CT 14.) Brooks was concerned that respondent might be shipping some more hazardous material and was concerned for the safety of the aircraft and its passengers. (CT 14.)

Frank arrived and instructed Brooks to open the package to determine if it did contain a dangerous substance. (CT 32.) Frank was also concerned about the safety of the passengers, crew and aircraft if this were indeed an undeclared hazardous substance; furthermore, Frank felt compelled by federal safety regulations and tariffs to inspect this suspicious package which had been brought to his attention. (CT 33, 48.)

Brooks opened the package and found two Pepsi bottles filled with yellowish liquid and heavily taped at the top, labeled "high grade two cycle model airplane oil," packaged in potato chips (this appeared to Frank to be an obvious

attempt to disguise any smell.) Brooks and Frank immediately called the narcotic task force housed at the Ontario Airport as they believed they had discovered illegal drugs. (CT 14-19, 27, 33-34, 49-51, 69; RT 5-6.)

Detective Michael Moriarity of the Los Angeles Police Department and Deputy Raul Bracamonte of the San Bernardino County Sheriff's Office arrived within thirty minutes. (CT 40, 52-53, 86-88.) Frank showed the officers the opened package and gave them permission to open the bottles. (CT 53-54.)

Upon opening one of the bottles, Detective Moriarity immediately noticed a strong ether odor which he associated with the illegal drug, PCP. (CT 54.) Deputy Bracamonte also smelled the ether and associated it with either PCP or liquid methamphetamine. (CT 91.)

Los Angeles Police Department Criminalist Bernard Sanchez was summoned to the airport and arrived about an hour after Officers Bracamonte and Moriarity. (CT 72, 55, 40.) Sanchez conducted an on-the-spot field-test of the liquid in the bottles. (CT 71-73.) Although the results were somewhat inconclusive, they did indicate "some sort of drug [was] present." (CT 73.) Sanchez conducted a more thorough test on the liquid the next day in the laboratory and determined conclusively that this was methamphetamine oil. (CT 74.)[3/]

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3. The California Court of Appeal presumed that a "broad" laboratory test (i.e., one capable of revealing the molecular structure of the tested substance) was used in this case because the prosecution did not meet its burden of showing that a "narrow" laboratory test (i.e., one capable of revealing only contraband substances) was used. (Appendix A, pp. 20-23.) Petitioner stipulates for this petition that a "broad" laboratory test was used.

Based on the above information, the police obtained a search warrant for respondent's dorm room at Claremont Colleges; they recovered all the lab equipment and chemicals necessary to produce methamphetamine, in addition to a formula for making methamphetamine and a gun. (CT 98-103.)

Respondent waived his *Miranda* rights and immediately confessed that the air shipment package was his and that all the chemicals and lab equipment in his dorm room were his. (CT 101-103.)

HOW THE FEDERAL QUESTION IS PRESENTED

In the trial court, counsel for respondent filed a motion to suppress the evidence seized from his air shipment package on the ground that the seizure and search of his package violated both the federal and state constitutions. (CT 135-136, 152, 160-168; RT 17, 9-12, 14-19.) Petitioner argued at the hearing on the

motion to suppress that under the Fourth Amendment, under the "plain view exception" to the warrant requirement, and under the rationale of *Chambers* v. *Maroney* (1969) 399 U.S. 42, 52 [i.e., that if the Government had a right to seize material which was obviously contraband, they had a right to search it as well], the Government had sustained its burden for having conducted a warrantless seizure and search of respondent's air shipment package. (CT 142-143, 165-167; RT 11, 13-14, 16-19.) *United States* v. *Miller* (9th Cir. 1985) 769 F.2d 554, which discusses the interrelationship between the plain view doctrine and the "single-purpose container exception" to the warrant requirement, was also addressed at the motion to suppress. (CT 162-164; RT 11, 13-14, 17.) The trial court's denial of respondent's motion to suppress implicitly

endorsed the Government's position on these arguments. (CT 170; RT 19.)

Respondent's Fourth Amendment argument was repeated to the California Court of Appeal which agreed with respondent's contention and excluded the seized evidence and confession, and reversed respondent's conviction under its interpretation of *United States* v. *Jacobsen* (1984) 466 U.S. 109. (*People* v. *Leichty* (1988) 205 Cal.App.3d 914, 923-924; appen. A, pp. 16-20.)

Petitioner's timely petition for review and alternative request for depublication to the California Supreme Court was denied. (Appendix B.)

REASONS FOR GRANTING THE WRIT

This case presents the Court with the opportunity of completing the evolution of the "single-purpose container exception" to the warrant requirement. This Court first created this exception in

Arkansas v. *Sanders* (1979) 442 U.S. 753, 764-765, fn. 13 [distinguished on other grounds, *United States* v. *Ross* (1982) 456 U.S. 798, 824], in discussing the reduced Fourth Amendment privacy expectations which exist in certain containers (such as burglar tool kits) whose outward appearances announce to the world that their single-purpose for existence is to house contraband. Evolving this exception in cases such as *Robbins* v. *California* (1981) 453 U.S. 420 [distinguished on other grounds in *New York* v. *Belton* (1981) 453 U.S. 454, 461 and *Colorado* v. *Bertine* (1987) 479 U.S. 367, 370] a plurality of the Court clarified that the "single-purpose container exception" is analytically "little more than another variation of the 'plain view' exception" to the warrant requirement. (*Id.* p. 427.)

Lower courts have extrapolated from this holding that therefore the

reasoning in the "plain view exception" case, *Arizona* v. *Hicks* (1987) 480 U.S. 321, should be equally applicable to "single-purpose container exception" cases. *Hicks* held that if an object could be lawfully seized under the "plain view exception," it was absurd to require a warrant to be obtained before the object could also be searched. The time has come for this Court to expressly extend the holding of *Hicks* to the "single-purpose container exception."

Certiorari should also be granted in this case to extend the "vehicle exception" to the warrant requirement to packages consigned to common carriers. Several Justices of this Court have previously indicated that they would be willing to do so. If the Court did so in this case, then the holding of the "vehicle exception" case *Chambers* v. *Maroney* (1969) 399 U.S. 42, 52, that the

right to seize contraband without a warrant carries with it the right to fully search said contraband without a warrant, could be invoked and the full warrantless search of the contraband in this case would be upheld.

Finally, certiorari should also be granted in the instant case to give further clarification to *United States* v. *Jacobsen* (1984) 466 U.S. 109, as *Jacobsen* was seriously misinterpreted by the Court of Appeal below and has ostensibly been misinterpreted by other lower courts as well.

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ARGUMENT

I

WHERE THE GOVERNMENT HAS PROPERLY SEIZED A PACKAGE IN PLAIN VIEW WHICH CLEARLY CONTAINS CONTRABAND BY ITS OUTWARD APPEARANCE THE GOVERNMENT SHOULD ALSO BE ENTITLED TO CONDUCT A FULL WARRANTLESS SEARCH OF THE PACKAGE SINCE ALL PRIVACY INTERESTS IN IT HAVE ALREADY BEEN EXTINGUISHED

Petitioner submits that the time is now ripe for this Court to complete the evolution of the "single-purpose container exception"[4/] to the warrant requirement by expressly extending to it the reasoning of the "plain view exception" case, *Arizona* v. *Hicks* (1987) 480 U.S. 321, 326, and expressly holding: where the Government has properly seized a package in plain view, which package also falls within the

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4. The Ninth Circuit coined the phrase "single-purpose container exception" in *United States* v. *Miller* (1985) 769 F.2d 554, 558, as a shorthand way of referring to this exception to the warrant requirement which was first created in *Arkansas* v. *Sanders* (1979) 442 U.S. 753, 764-765, fn. 13.

"single-purpose container exception," the Government is also entitled to conduct a full warrantless search of the package since all privacy interests in the package have already been extinguished.

A. THIS CASE IS THE NEXT LOGICAL STEP IN THE EVOLUTION OF THE "SINGLE-PURPOSE CONTAINER EXCEPTION" TO THE WARRANT REQUIREMENT

Justice Scalia, writing for the majority in *Arizona* v. *Hicks*, *supra*, 480 U.S. 321 held that if an object in plain view can be properly seized without a warrant, it can also be searched without a warrant:

> "It would be absurd to say that an object could lawfully be seized and taken from the premises, but could not be moved for closer examination. It is clear, therefore, that the search here was valid if the 'plain view' doctrine would have sustained a seizure of the equipment." (Emphasis added; *Id.*, at p. 326.)

Certiorari should be granted in the instant case so that this Court can provide guidance for lower courts that the

analysis in *Hicks* is directly applicable to "single-purpose container exception" cases. Some lower courts have anticipated the direction of this Court and have already begun applying *Hicks* to "single-purpose container exception" cases. (*United States* v. *Williams* (D.C. Cir. 1987) 822 F.2d 1174, 1180-1186; *People* v. *Williams* (1988) 198 Cal.App.3d 873, 891; see also 1 W. LaFave, Search & Seizure § 2.2, at p. 240, § 7.2 at p. 254 fn. 73 (1978); see also J. Choper, Y. Kamisar & L. Tribe, The Supreme Court: Trends and Developments 1980-1981 at pp. 104-105 (1982).)

The evolution of the "single-purpose container exception" shows that the Court has been moving in this direction. The exception was first created by this Court in *Arkansas* v. *Sanders* (1979) 442 U.S. 753, 764-765, fn. 13:

> "Not all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment. Thus, some containers (for example a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance. Similarly, in some cases the contents of a package will be open to 'plain view,' thereby obviating the need for a warrant." (Emphasis added.)

In *Robbins* v. *California* (1981) 453 U.S. 420, Justice Stewart writing for a plurality of the Court refined the implications of footnote 13 of *Sanders* and the theoretical underpinnings of the "single-purpose container exception" by pointing out that:

> "[The single-purpose container] exception is likewise little more than another variation of the 'plain view' exception, since, if the distinctive configuration of a container proclaims its contents, the contents cannot fairly be said to have been removed from a searching officer's view." (Emphasis added; *Id.*, at p. 427.)

If the "single-purpose container exception" is therefore "little more than another variation of the 'plain view' exception," it makes absolute sense that the analysis of *Hicks*, a "plain view exception" case should be equally if not more applicable to "single-purpose container exception" cases.

One of the principal defects in the opinion of the California Court of Appeal below is that it fails to apply a *Hicks* type of analysis. The Court of Appeal expressly found that the police officers who had been summoned by the airport employees "violated no rule of law in visually examining the contents of the opened package, which were in plain view. [Citations]" (Emphasis added; *People* v. *Leichty* (1988) 205 Cal.App.3d 914, 920; appen. A, pp. 10-11.) The Court of Appeal also went on to find that given the unique and distinctive packaging of the

contraband, the officer's experience with narcotics smuggling, and five other enumerated factors, ample probable cause existed in this case to justify governmental seizure of respondent's air shipment package without a warrant because the material was obviously contraband:

> "Based on the law enforcement officers' testimony, we hold that they [the government's agents] had probable cause to believe that the bottles contained contraband before opening and field testing them. The facts which they possessed concerning the bottles would have led any person of reasonable caution to believe that the bottles contained contraband drugs." (Emphasis added; *People* v. *Leichty*, *supra*, 205 Cal.App.3d at pp. 920-921; appen. A, pp. 13-14.)

Where the Court of Appeal's analysis falters, however, is in its failure to take the next logical step. It acknowledges that the bottles of methamphetamine oil were in plain view and that by their packaging any reasonable person would have concluded the bottles contained contraband (i.e., the "single-

purpose container exception"), however, because *Hicks* has not yet been expressly extended to "single-purpose container exception" cases by this Court, the Court of Appeal apparently felt that it was not on solid ground to rule that the right to seize a "single-purpose container" filled with obvious contraband carries with it the right to conduct a full search of said contraband. Certiorari should therefore be granted to instruct lower courts that these two rights go hand-in-hand once governmental agents encounter obvious contraband.

B. **CERTIORARI SHOULD BE GRANTED TO DELINEATE THAT THE "VEHICLE EXCEPTION" TO THE WARRANT REQUIREMENT ALSO APPLIES TO PACKAGES CONSIGNED TO COMMON CARRIERS**

Chambers v. *Maroney* (1969) 399 U.S. 42, 50, fn. 8, instructs us that the "vehicle exception" to the warrant requirement applies not only to automobiles, but also to "other vehicles."

Several justices of this Court have indicated that they would be willing to extend the "vehicle exception" to packages consigned to a common carrier as they are "things readily moved rather than a fixed piece of property." (*Arkansas* v. *Sanders*, *supra*, 442 U.S. at p. 769 (Blackmun, J., dissenting); *Robbins* v. *California*, *supra*, 453 U.S. at pp. 440-441 (Rehnquist, J., dissenting); see also *People* v. *McKinnon* (1972) 7 Cal.3d 899, 908-917 [cert. denied 411 U.S. 931].) This case presents the Court with the opportunity of taking that step.

The prosecution relied on the applicability of *Chambers* to this case at the hearing on the motion to suppress. (CT 143; RT 9.) The California Court of Appeal implicitly acknowledged the applicability of the "vehicle exception" in this case and its underlying rationale regarding the object's high mobility when

it held that the police officers here acted properly in seizing the air shipment package and preventing it from being "shipped out of the officers' jurisdiction." (*People* v. *Leichty*, *supra*, 205 Cal.App.3d at p. 921; appen. A, p. 14.)

However, because no decision by this Court has come out squarely extending the "vehicle exception" to packages consigned to common carriers, the Court of Appeal here was constrained from doing so. Had such an opinion previously come down from this Court, the Court of Appeal would then have been at liberty to apply the *Hicks*-type rule which had already been announced in *Chambers* (but limited to "vehicle exception" cases):

> "For constitutional purposes, we see no difference between on the one hand seizing and holding a car [or any other instrumentality subject to the "vehicle exception"] before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is

> reasonable under the Fourth Amendment." (Emphasis added; *Chambers* v. *Maroney*, *supra*, 399 U.S. at p. 52.)

The same proper result would thus have been possible in this case under two separate exceptions to the warrant requirement if only this Court had extended *Hicks* to the "single-purpose container exception" or if this Court had expressly extended the "vehicle exception" to packages consigned to common carriers. Had it done the latter, the holding of *Chambers* could have been evoked and the full search of the contraband would not have triggered suppression of the evidence. Countless other drug cases with similar facts will continue to be dismissed until this Court expressly extends the "vehicle exception" to packages consigned to common carriers.

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C. CERTIORARI SHOULD BE GRANTED TO GIVE FURTHER CLARIFICATION TO *UNITED STATES* v. *JACOBSEN* (1984) 466 U.S. 109 AS LOWER COURTS ARE SERIOUSLY MISINTERPRETING IT

As a final matter, petitioner submits that *United States* v. *Jacobsen*, *supra*, 466 U.S. 109 is being seriously misinterpreted by lower courts. This Court should therefore grant certiorari in this case as it is an appropriate vehicle for clarifying the intent of *Jacobsen*. The language in *Jacobsen* which is being misinterpreted is as follows:

> "Even when government agents may lawfully seize such a[n airfreight] package to prevent loss or destruction of **suspected** contraband, the Fourth Amendment requires that they obtain a warrant before examining the contents of such a package. [Footnote 8 omitted.]" (Emphasis added; *Id.*, at p. 114.)

Given the foregoing discussion, it is readily apparent that "suspected" is the key modifying adjective in this quote. In contrast, had the package been "clearly contraband" (e.g., because this package

met the "single-purpose container exception") then no warrant would have been necessary either to seize or to search it, since there is no Fourth Amendment expectation of privacy in contraband. (*United States* v. *Jacobsen*, *supra*, 466 U.S. at p. 122)

Had the Court of Appeal in this case which went into detailed analysis of *Jacobsen* properly focused on the adjective "suspected," it would have realized that a different standard applies for packages which are clearly contraband (i.e., the standard announced in *Chambers* and *Hicks*.)

An examination of the facts in *United States* v. *Mulder* (9th Cir. 1987) 808 F.2d 1346 (a case which was heavily relied on by the Court of Appeal in *Leichty* for purposes of interpreting *Jacobsen*) reveals that had the Ninth Circuit focused on the adjective "suspected" in *Jacobsen*, it also would

have realized that obvious contraband (there, 10,033 pills contained in clear plastic bags hidden in a brown paper bag without any prescription labels or markings) does not have the same privacy expectations as suspected contraband.

Absent clarification by this Court, lower courts (such as *Leichty* and *Mulder*) will continue to overlook the modifying adjective "suspected" in *Jacobsen* and improperly extend Fourth Amendment privacy protection to narcotic contraband in which there is no legitimate privacy interest.

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CONCLUSION

For the foregoing reasons petitioner respectfully submits that the writ of certiorari should issue to review the decision of the California Court of Appeal in this case.

Respectfully submitted,

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APPENDIX A

APPENDIX A

CERTIFIED FOR PUBLICATION

[Filed November 1, 1988]

COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	
Plaintiff and Respondent,	E004695
v.	(Super. Ct. No.
STEPHEN EDWARD LEICHTY,	OCR12262)
Defendant and Appellant.	OPINION

APPEAL from the Superior Court of San Bernardino County. Clifton L. Allen, Judge. Reversed.

Dennis S. Tilton and Richard Price for Defendant and Appellant.

John K. Van de Kamp, Attorney General, Steve White, Chief Assistant Attorney General, Michael D. Wellington, Supervising Deputy Attorney General,

Esteban Hernández and Janelle B. Davis, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant pled nolo contendere to one count of possession of methamphetamine for sale (Health & Saf. Code, § 11378). He was granted three years' probation on the condition that he serve 120 days in county jail. He appeals from the denial of his motion to suppress evidence pursuant to section 1538.5 of the Penal Code, on the ground that the evidence was the fruit of an illegal warrantless search.

FACTS

Michael Brooks, air cargo supervisor of an air freight facility at Ontario airport, was on duty on an evening in early September 1986. He noticed a five-gallon plastic container which had been received in shipment. The container was empty but smelled of ether; it had not been declared a hazardous materials at the

time of shipping, as is required in shipping such items. The package was addressed to defendant, but was picked up by a man who identified himself as Ramsey. Because of his concern that a hazardous material had been shipped improperly, Brooks contacted defendant by phone and explained to him the danger involved in shipping ether and the procedures for doing so. Defendant indicated he would not violate the procedures in the future.

Some 20 days later Brooks was again on duty at the air freight facility when defendant brought in a package for shipment. Defendant appeared very nervous and wore dark glassed. He stated that the package contained personal effects and Brooks accepted it for shipment. Brooks did not know defendant by sight; however, after defendant left the facility, Brooks recognized the name on the shipment as the name to which the empty ether bottle had

been addressed. He became concerned that the shipment might contain hazardous materials and, along with an employee of the shipping airline, opened the package.

When the two men opened the package, the found two Pepsi bottles containing a yellowish liquid. The bottles had been packed in paper and potato chips. They had handwritten labels which stated that they contained "high grade two cycle model airplane oil." Brooks did not know whether airplane oil was a petroleum distillate and thus a hazardous material which must be declared prior to shipment. He also suspected that the package contained narcotics because of the method of packaging and the previous shipment of the ether bottle. He contacted the airport narcotics task force for assistance in identifying the contents of the bottles.

Two officers from the narcotics task force came to the air freight facility at 5:30 p.m. in response to Brooks' call--police detective Moriarity and sheriff's deputy Bracamonte. Brooks showed Moriarity the two Pepsi bottles in the open package. He also told Moriarity about the previous ether bottle shipment. Moriarity made a visual inspection of the bottles, which had screw-on caps and were sealed with cellophane tape. After looking at the bottles, Moriarity felt he had probable cause to believe that they contained contraband, specifically PCP. Bracamonte though the liquid could be either PCP or liquid methamphetamine. After receiving permission to open the bottles from the airline employee, Moriarity opened one of the bottles and immediately smelled a strong, ether-like odor. Bracamonte also smelled ether. Moriarity then took the bottles to the

task force office and contacted a criminalist to come to the office to investigate the bottles. Criminalist Sanchez of the Los Angeles Police Department reported to the task force office at 7:30 the same evening to perform field tests on the contents of the bottles. He performed two tests on the contends of the bottles; one was for "PCP and/or some other similar drugs," and the other for amphetamines. He testified: "The results of those tests weren't very conclusive. The results indicated some sort of drug present, but they were not the results I expected for PCP or methamphetamine . . . ."

Detective Moriarity then took the two bottles to the Los Angeles Police Department property division at Parker Center in downtown Los Angeles, where he booked them into evidence. On the following day criminalist Sanchez

conducted laboratory tests on the contents of the bottles and concluded that they contained methamphetamine oil. Sanchez testified that normally he would not have conducted the laboratory tests because he was assigned to another unit. However, he testified that he performed the tests himself for the following reason: ". . . I was curious as to the nature of the substance, to relate back to the test that I performed on it and why they appeared the way they did." No search warrant was obtained before the laboratory tests were carried out.

Police detective Greenwell had been in the airport narcotic task force office when detective Moriarity brought the bottles there for field testing. Based on the results of the investigation of the suspicious package and the results of the laboratory tests at Parker Center, he obtained a warrant to search defendant's

dormitory room at a local college. The search of the dorm room and a storage unit rented by defendant revealed numerous pieces of chemical apparatus normally used in the manufacture of methamphetamine, all of the chemical ingredients necessary for making amphetamine, and substances which tested positive in field tests for amphetamines.

A Drug Enforcement Administration (DEA) officer arrested defendant pursuant to a warrant outside his dormitory. He was taken back to his room where a search was commenced. In a room next to defendant's dorm room, Greenwell gave defendant his Miranda warnings and questioned him concerning the incident. Defendant confessed to possessing and manufacturing methamphetamine.

Additional facts will be set out where pertinent to the discussion below.

/

ISSUES ON APPEAL

Defendant contends that the law enforcement officers' exercise of dominion and control over the Pepsi bottles after visual examination constituted an illegal seizure without probable cause to believe that the bottles contained contraband; and that the opening and field testing of the contends of the bottles, as well as the laboratory testing, exceeded the scope of the private search and thus were illegal warrantless searches; so that the trial court erred in failing to suppress the evidence of the nature of the bottles' contents. He also contends that the evidence obtained as the result of the illegal seizure and searches, including all the physical evidence found in his dorm room and storage unit and his incriminating statements made at the time of the search, should be suppressed as the fruit of the poisonous tree. As we

explain below, we agree that the trial court erred in failing to grant defendant's suppression motion.

DISCUSSION

I

PROBABLE CAUSE TO SEIZE CONTRABAND

Defendant concedes that the initial opening and viewing of the contends of defendant's package was a private search by air cargo and airline employees and thus not subject to the exclusionary rule; and that Detective Moriarity and Deputy Bracamonte violated no rule of law in visually examining the contends of the opened package, which were in plain view. (United States v. Jacobsen (1984) 466 U.S. 109, 114-118; Walter v. United States (1980) 447 U.S. 649, 657.) However, he argues that these officials did not have probable cause to believe that the bottles contained contraband after the visual

inspection, and thus acted unlawfully in seizing the bottles without a warrant.

"[I]t is well settled that it is constitutionally reasonable for law enforcement officials to seize 'effects' that cannot support a justifiable expectation of privacy without a warrant, based on probable cause to believe they contain contraband." (United States v. Jacobsen, supra, 466 U.S. 109, 121-122; see United States v. Place (1983) 462 U.S. 696, 701-702.) "'[P]robable cause is a flexible, common sense standard.' Texas v. Brown, 460 U.S. 730, 742 [citations] (1983). It requires only that facts be available to the officers which would 'warrant a [person] of reasonable caution, Carroll v. United States, 267 U.S. 132, 162 [citations] (1925), to believe that certain items may be contraband or evidence of a crime. Brown, 460 U.S. at 742 [citation]. 'A "practical,

nontechnical" probability that incriminating evidence is involved is all that is required.' Id. (quoting Brinegar v. United States, 338 U.S. 160, 176 [citations] (1949))." (United States v. Licata (9th Cir. 1985) 761 F.2d 537, 542.)

In the instant case, Detective Moriarity testified that before opening the bottles he felt he had probable caused to believe the bottles contained contraband, based on the following factors: (1) the suspicious circumstances surrounding the two shipments; (2) his own experience; (3) his observations of a silver residue in the two bottles, which he believed to be magnesium turnings used in manufacturing PCP; (4) the color of the liquid, which was consistent with liquid PCP; (5) the fact that defendant had indicated to the air cargo supervisor that the package contained personal effects, rather than model airplane oil; (6) his

belief that model airplane oil must be commercially available so that there would be no need to repackage it in Pepsi bottles; and (7) the fact that the bottles were packaged in potato chips (he knew from experience that contraband was sometimes packaged in food products to mislead narcotic-sniffing dogs).

Deputy Bracamonte testified that after viewing and smelling the bottles he thought they contained either PCP or methamphetamine oil. He stated that he has seen methamphetamine oil before and that it had the same "Wesson oil-looking quality" as the liquid in the bottles. He, like Moriarity, saw metal residue in the bottles, and he testified that he had seen such residue before in both PCP and methamphetamine oil.

Based on the law enforcement officers' testimony, we hold they had probable cause to believe that the bottles

contained contraband before opening and field testing them. The facts which they possessed concerning the bottles would have led any person of reasonable caution to believe that the bottles contained contraband drugs; failure to seize the bottles in such circumstances would have been a dereliction of duty, given the fact that the bottles were in a busy air terminus and were scheduled to be shipped out of the officers' jurisdiction.

II

WARRANTLESS FIELD TESTING

Defendant contends that, even if the officers did have probable cause to seize the bottles without a warrant, they violated his Fourth Amendment rights by conducting field tests to ascertain the contends of the bottles without first obtaining a search warrant. He argues that because this "search" exceeded the scope of the private search which had been

conducted by the air cargo and airlines employees a warrant was required, citing Walter v. United States, supra, 447 U.S. at page 657.

In Walter an interstate shipment of obscene films was mistakenly delivered to a business office. (Id., at p. 651.) The officer personnel opened the shipment and examined the individual film boxes on which were suggestive drawings and explicit descriptions of the contends of the films. (Id., at pp. 651-652.) The office employees did not view the films. (Id., at p. 652.) They contacted F.B.I. agents who seized the films and viewed them with a projector without obtaining a warrant. (Ibid.) The Government argued that it did not expand the private search by viewing the films because the private search had already destroyed the defendant's reasonable expectation of privacy in the shipment. (Id., at p.

658.) A plurality of the court concluded that only part of the defendant's legitimate expectation of privacy had been frustrated by the private search, because the office employees had not viewed the actual contends of the films. (Id., at p. 659.) It explained that the F.B.I. agents would have had the right to exceed the scope of the private search only if they had a right to make an independent search, and held that the agent's independent search was unlawful because it was conducted in the absence of any exigency. (Id., at p. 657.)

In United States v. Jacobsen, supra, 466 U.S. 109, decided four years after Walter, the Supreme Court was confronted with a case very factually similar to the case at bench. Employees of a private air freight carrier examined a package which had been damaged by a forklift. (Id., at p. 111.) Inside the package they found

about six ounces of white powder in a Ziploc bag concealed inside a tube constructed of duct tape. (Ibid.) The employees summoned a D.E.A. agent who removed a trace of the white powder and conducted a test which revealed the powder to be cocaine. (Id., at p. 112.) The field test used would disclose whether or not a substance was cocaine, but there was no evidence it would identify any other substance. (Id., at p. 112, fn. 1.)

A majority court in Jacobsen applied the Walter test, examining D.E.A. agents' actions to see how far they exceeded the scope of the private search. (Id., at p. 115.) It concluded the agents exceeded the scope of the private search by field testing for cocaine; however, it then went on to determine whether the additional intrusion by the field test actually amounted to a "search" within the meaning of the Fourth Amendment, posing and

answering the question of whether the test "infringe[d] an expectation of privacy that society is prepared to consider reasonable." (Id., at p. 122.) First, it emphasized that the test could tell the agents nothing more than whether or not the substance was cocaine-- "not even whether the substance was sugar or talcum powder." (Ibid.) It then concluded: "A chemical test that merely discloses whether or not a particular substance is cocaine does not compromise any legitimate interest in privacy. This conclusion is not dependent on the result of any particular test. It is probably safe to assume that virtually all of the tests conducted under circumstances comparable to those disclosed by this record would result in a positive finding; in such cases, no legitimate interest has been compromised. But even if the results are negative--merely disclosing that the

substance is something other than cocaine--such a result reveals nothing of special interest. Congress has decided--and there is no question about its power to do so--to treat the interest in 'privately' possessing cocaine as illegitimate; thus governmental conduct that can reveal whether a substance is cocaine, and no other arguable 'private' facts, compromises no legitimate privacy interest." (Id., at p. 123.) The court held that "the likelihood that official conduct of the kind disclosed by the record will actually compromise any legitimate interest in privacy seems much too remote to characterize the [field] testing as a search subject to the Fourth Amendment." (Id., at p. 124.)

The field test of the bottles in this case likewise cannot be characterized as a search subject to the Fourth Amendment. The criminalist tested only for the

presence of PCP and methamphetamine oil, neither of which is subject to a legitimate interest in privacy. The field tests used were designed to reveal only whether methamphetamine, PCP, or similar drugs were present. Thus, law enforcement officers did not violate defendant's Fourth Amendment rights by field testing the bottles.

III

WARRANTLESS LABORATORY TESTING

While the field tests did not constitute an illegal warrantless search, the tests conducted at the police laboratory without benefit of a warrant are another matter. Because warrantless searches are presumptively unreasonable, the prosecution must bear the burden of legally justifying warrantless activity such as that carried out by law enforcement officers in this case. (Coolidge v. New Hampshire (1971) 403 U.S.

443, 445-455.) The field tests were inconclusive as to whether the bottles contained either PCP or methamphetamine oil. The criminalist testified that they revealed only that "some drug" was present; he did not state that the tests showed the unknown drug was contraband. The criminalist also testified that he personally tested the contents of the bottles in the police lab because he was curious "as to the nature of substance," given the unexpected results of the field tests. He did not state whether the tests he conducted were designed only to show whether or not the bottles contained PCP, methamphetamine oil, or similar contraband drugs, or would have revealed the identity of the contends even if it were a substance in which defendant had a legitimate privacy interest. Thus, we conclude that the prosecution failed to carry its burden under Jacobsen to show

that this significant expansion of the scope of the private search did not constitute a search within the meaning of the Fourth Amendment.

In reaching the above conclusion we are aided by the analysis in United States v. Mulder (9th Cir. 1987) 808 F.2d 1346. In Mulder, hotel employees searched a guest's suitcase and found 10 clear plastic bags containing tablets inscribed with the lettering "LEMMON 7/14." (Id., at p. 1347.) They contacted D.E.A. agents who seized the bags and, without obtaining a warrant, took them to a laboratory where they were tested "through the use of mass spectrometry, infrared spectroscopy and gas chromatography." (Id., at p. 1348.) The tests showed that the tablets were methaqualone. (Ibid.) The government argued that the warrantless testing was not unlawful because it did not exceed the scope of the private search. (Ibid.) The

court concluded that the lab testing exceeded the scope of the private search, and refused to extend the Jacobsen field test exception to the warrant requirement to the case before it. (Id., at pp. 1348-1349.) It reasoned: "First of all, this case does not involve a field test, but a series of tests conducted in a toxicology laboratory several days after the tablets were seized. Secondly, the chemical testing in this case was not a field test which could merely disclose whether or not the substance was a particular substance, but was a series of tests designed to reveal the molecular structure of a substance and indicate precisely what it is. Because of the greater sophistication of these tests, they could have revealed an arguably private fact." (Ibid.)

As in Mulder, the facts of this case do not warrant the extension of the Jacobsen field test case to laboratory

testing. They involved testing in a police laboratory the day after the seizure and there is no evidence that the lab tests were limited only to those which would reveal the presence of contraband drugs. Moreover, because no exigency existed once the law enforcement officers had secured the bottles and removed them to police headquarters, a warrantless search could not be justified on any other basis. (Walter v. United States, supra, 447 U.S. at p. 657.)[1/]

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1. The People contend that the search was legal because the air cargo and airline personnel gave their consent to the search, or that defendant impliedly consented to the search because once he entered the "package shipment area, he was confronted with signs warning him that all packages were subject to inspection for explosives, etc." These contentions are without merit. The People's argument, unsupported by any authority, that third party consent by airport personnel rendered the warrantless laboratory tests legal is specious, especially because at the time the laboratory tests were run it had been determined that the bottles contained "some sort of drug," rather than explosives. Moreover, the

IV

SUPPRESSION OF THE EVIDENCE AS THE "FRUIT OF THE POISONOUS TREE"[2/]

Defendant contends the evidence discovered in the search of his dorm room and storage room pursuant to a search warrant, as well as the incriminating statements he made to law enforcement officers at the time of the search, must be suppressed because they were elicited based on "tainted" evidence obtained in the warrantless laboratory tests. The

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People failed to carry their burden to show that warning signs about inspections were posted in the air freight facility when defendant took the package there for shipment. A witness was asked whether there were such signs posted in the facility on the day defendant brought in the package containing the bottles. He stated that there should have been a sign on the counter of the facility, but could not recollect whether a sign was in fact posted there on that day. (See United States v. Davis (9th Cir. 1973) 482 F.2d 893, 914-915.)

2. Wong Sun v. United States (1963) 371 U.S. 471, 488.

People do not deny that the search warrant was based on tainted evidence; however, they argue that the evidence was properly admitted under the "good faith exception" to the exclusionary rule established in United States v. Leon (1984) 468 U.S. 897.

In Wong Sun v. United States, supra, 371 U.S. at page 488 our Supreme Court held that evidence which "has been come at by exploitation of [a primary] illegality" rather than "by means sufficiently distinguishable to be purged of the primary taint," must be suppressed pursuant to the exclusionary rule. In the case at bench, there has been no assertion by either party that the physical evidence and admissions in question were gotten at by means separate from the illegal warrantless laboratory tests. Thus, the search warrant was obtained and the evidence gathered by exploitation of a primary illegality. Under Wong Sun, the

trial court erred in failing to suppress this evidence pursuant to the exclusionary rule.

United States v. Leon, supra, 468 U.S. at page 922, recognized a good faith exception to the exclusionary rule. In Leon, police conducted a search pursuant to a warrant which later proved to be lacking in probable cause but which was not legally deficient on its face. (Id., at p. 926.) The Supreme Court held that "the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion." (Id., at p. 922.) In reaching its decision, the court pointed out that the purpose of the exclusionary rule is "to deter police misconduct rather than to punish the errors of judges and magistrates." (Id., at p. 916.) It

stated that "[i]f exclusion of evidence obtained pursuant to a subsequently invalidated warrant is to have any deterrent effect, . . . , it must alter the behavior of individual law enforcement officers or the policies of their departments." (Id., at p. 918.) The court concluded that "suppression of evidence . . . should be ordered only on a case-by-case basis and only in those unusual cases in which exclusion will further the purposes of the exclusionary rule." (Ibid.) The court ruled that the exclusionary doctrine did not apply tc the case before it, because to was a close legal question as to whether there was in fact probable cause to support the warrant, and the defect in the warrant could not have been apparent to the police officers who sought and executed it. (Id., at p. 926.)

Approaching this matter on a case-by-case basis, as required by Leon, we must conclude that it is one of those "cases in which exclusion will further the purposes of the exclusionary rule." (Id., at p. 918.) Here, unlike in Leon, the law enforcement officers obtained the search warrant through exploitation of their primary illegal behavior in conducting laboratory tests on the contents of the Pepsi bottles. Thus, imposition of the exclusionary rule will work to deter this illegal behavior, rather than to punish a judicial or magisterial error. Though we reach this conclusion reluctantly given the very serious nature of defendant's admitted transgressions, we feel that we are compelled to do so by existing law.

We are aided in reaching the above conclusion by U.S. v. Vasey (9th Cir. 1987) 834 F.2d 782, in which the circuit court was also confronted with a case in

which tainted evidence obtained through an illegal warrantless search was included in the affidavit to support issuance of a search warrant. (Id., at pp. 788-789.) In Vasey, as here, the court concluded that the Leon analysis did not apply because the officers who obtained and served the warrant were acting in bad faith when they gathered and used the tainted evidence. (Id., at p. 789; accord: U.S. v. Villard (D.N.J. 1988) 678 F.Supp. 483, 490-493.) The Vasey court also held that the action of the magistrate in considering the evidence offered to support the search warrant did not "sanitize the taint of the illegal warrantless search," because a magistrate, working under time constraints and without benefit of an adversarial hearing, "is simply not in a position to evaluate the legality" of [the warrantless] search. (U.S. v. Vasey, supra, 834 F.2d at p. 789;

accord: U.S. v. Villard, supra, 678 F.Supp. at p. 493.)[3/]

Based on the above analysis, we hold that the evidence obtained pursuant to the search warrant, including both the physical evidence and defendant's incriminating statements made at the time of the search, is subject to the exclusionary rule. The trial court erred in failing to exclude this evidence pursuant to defendant's motion to suppress.

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3. The People also cite Rodriquez v. Superior Court (1988) 199 Cal.App.3d 1453 to support their argument that the Leon good faith exception applies to this case. Rodriquez is inapposite, however, since it does not involve the use of tainted evidence to support the search warrant in question.

DISPOSITION

Judgment ~~reversed~~.

CERTIFIED FOR PUBLICATION

/s/ Schulte
J.*

We concur:

/s/ Campbell
P.J.

/s/ Hews
J.

*Retired judge of the superior court sitting under assignment by the Chairperson of the Judicial Council.

A P P E N D I X B

APPENDIX B

[Filed February 15, 1989]

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

4th District, Division 2, No. E004695
S008103

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

PEOPLE

v.

STEPHEN EDWARD LEICHTY

Respondent's petition for review DENIED.

The request for an order directing depublication of the opinion in the above-entitled cause is DENIED.

/s/ Lucas
Chief Justice

AFFIDAVIT OF SERVICE BY MAIL

Attorney:

JOHN K. VAN DE KAMP
Attorney General of
the State of California
ESTEBAN HERNANDEZ
Deputy Attorney General

110 West A Street, Suite 700
San Diego, California 92101

No:
October Term, 1988

THE STATE OF CALIFORNIA,
Petitioner,

v.

STEPHEN EDWARD LEICHTY,
Respondent.

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 700, San Diego, California 92101.

I have served the within PETITION FOR WRIT OF CERTIORARI as follows: To Joseph F. Spaniol, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and forty-one (41) copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing one copy in a separate envelope addressed for and to each addressee named as follows:

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FOR DELIVERY TO: Hon. Clifton L. Allen

Each envelope was then sealed and with the postage prepaid deposited in the United States mail by me at San Diego, California, on the 11th day of April, 1989.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, April 11, 1989.

Cecilia C. Garcia
CECILIA C. GARCIA

Subscribed and sworn to before me
this 11 day of April 1989.

Susan Lauren, Orange, CA.
Notary Public in and for said County and State

SUSAN LAUREN
NOTARY PUBLIC - CALIFORNIA
COUNTY OF ORANGE
My Commission expires August 22, 1991

BEST AVAILABLE COPY